

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
3

4 ERNEST SUNRHODES,

5 Petitioner,

2:14-cv-01368-GMN-VCF

6 vs.

ORDER

7 ATTORNEY GENERAL, *et al.*,

8 Respondents.  
9 \_\_\_\_\_/

10 This case is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by  
11 Ernest Sunrhodes. Sunrhodes was convicted in 2009, in Nevada's Eighth Judicial District Court, of  
12 two counts of sexual assault on a minor under 14, and one count of lewdness with a child under 14.  
13 *See* Petition for Writ of Habeas Corpus (ECF No. 5), pp. 1-2. He is serving two sentences of  
14 20 years to life in prison, and one sentence of 10 years to life in prison, the three sentences running  
15 concurrently. *See id.* at 2. The court received Sunrhodes' *pro se* federal habeas petition on  
16 August 21, 2014. The petition asserts five grounds for habeas corpus relief.

17 On November 14, 2014, the court screened Sunrhodes' habeas petition, pursuant to Rule 4 of  
18 the Rules Governing Section 2254 Cases in the United States District Courts. *See* Order entered  
19 November 14, 2014 (ECF No. 4). The court dismissed Grounds 4 and 5, as those were claims of  
20 ineffective assistance of counsel in state habeas proceedings, and there is no federal constitutional  
21 right to effective assistance of counsel in such proceedings. *See id.* at 1-2.

22 On December 26, 2014, the respondents filed a motion to dismiss (ECF No. 7), arguing that  
23 Grounds 2 and 3 of Sunrhodes' habeas petition are unexhausted in state court. Motion to Dismiss  
24 (ECF No. 7), pp. 3-8.

25 Sunrhodes responded to the motion to dismiss on February 27, 2015, by filing a motion for  
26 leave to amend (ECF No. 13). In that motion, Sunrhodes concedes that some of the grounds for

1 relief in his petition are not fully exhausted, and he requests leave of court to amend his petition to  
2 present only exhausted grounds for relief. *See* Motion for Leave to Amend Habeas Petition  
3 (ECF No. 13), pp. 1-2. Respondents did not respond to Sunrhodes' motion for leave to amend.

4 A federal court may not grant habeas corpus relief on a claim not exhausted in state court.  
5 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is  
6 intended to allow state courts the initial opportunity to correct constitutional deprivations. *See*  
7 *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present the  
8 claim to the highest state court, and must give that court the opportunity to address and resolve it.  
9 *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,  
10 10 (1992). A claim is fairly presented to the state's highest court if, before that court, the petitioner  
11 describes the operative facts and legal theory upon which the claim is based. *See Anderson v.*  
12 *Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard*, 404 U.S. at 275; *Batchelor v. Cupp*, 693 F.2d  
13 859, 862 (9th Cir. 1982).

14 The exhibits filed by respondents with their motion to dismiss (ECF No. 8) reflect that  
15 Sunrhodes has litigated two appeals before the Nevada Supreme Court: his direct appeal, and an  
16 appeal from the denial of a state-court habeas petition. It appears, then, that the question of  
17 Sunrhodes' exhaustion of claims in state court is controlled by the claims that he asserted on his  
18 direct appeal (*see* Appellant's Opening Brief, Exhibit 14) and on the appeal in his state habeas action  
19 (*see* Appellant's Opening Brief, Exhibit 27).

20 Ground 2 of Sunrhodes' habeas petition is a claim that the attorney who represented him at  
21 his preliminary hearing was ineffective for failing to object to the justice court's order closing the  
22 preliminary hearing to the public. *See* Petition for Writ of Habeas Corpus, p. 5. Sunrhodes did not  
23 assert this claim before the Nevada Supreme Court on his direct appeal or on the appeal in his state  
24 habeas action. *See* Appellant's Opening Brief, Exhibit 14; Appellant's Opening Brief, Exhibit 27.  
25 Ground 2 is unexhausted in state court.

26 Ground 3 of Sunrhodes' habeas petition is a claim that his trial counsel was ineffective for

1 failing to file a petition for writ of mandamus in the Nevada Supreme Court challenging the justice  
2 court's order closing the preliminary hearing to the public. *See* Petition for Writ of Habeas Corpus,  
3 p. 7. Sunrhodes did not assert this claim before the Nevada Supreme Court on his direct appeal or on  
4 the appeal in his state habeas action. *See* Appellant's Opening Brief, Exhibit 14; Appellant's  
5 Opening Brief, Exhibit 27. Ground 3 is unexhausted in state court.

6 A petition for writ of habeas corpus "may be amended or supplemented as provided in the  
7 rules of procedure applicable to civil actions." 28 U.S.C. § 2242; *see also* Rule 12 of the Rules  
8 Governing Section 2254 Cases in the United States District Courts (recognizing general applicability  
9 of rules of civil procedure in habeas cases). Sunrhodes' motion for leave to amend is governed by  
10 Federal Rule of Civil Procedure 15(a)(2), which permits an amended pleading "only with the  
11 opposing party's written consent or the court's leave." The court "should freely give leave when  
12 justice so requires." *See, e.g., Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 614 (9th  
13 Cir.1993) (denial of leave to amend reviewed "for abuse of discretion and in light of the strong  
14 public policy permitting amendment."). Factors to be considered include "bad faith, undue delay,  
15 prejudice to the opposing party, futility of the amendment, and whether the party has previously  
16 amended his pleadings." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir.1995). Here, there is no  
17 indication of bad faith, undue delay, or prejudice to the opposing party. Respondents have not  
18 responded to the motion for leave to amend. There is no indication that the amendment would be  
19 futile, as Sunrhodes seeks to amend his petition to present only exhausted claims. Under the  
20 circumstances, in this case, granting Sunrhodes leave to amend appears to be in the interest of  
21 justice.

22 **IT IS THEREFORE ORDERED** that respondents' Motion to Dismiss Petition for Writ of  
23 Habeas Corpus (ECF No. 7) is **GRANTED IN PART AND DENIED IN PART**. The court finds  
24 Grounds 2 and 3 of the habeas corpus petition (ECF No. 5) to be unexhausted in state court. The  
25 court will grant petitioner an opportunity to amend his habeas corpus petition.

26 **IT IS FURTHER ORDERED** that petitioner's Motion for Leave to Amend Habeas Petition

1 (ECF No. 13) is **GRANTED**.

2 **IT IS FURTHER ORDERED** that petitioner shall have **45 days** from the date of entry of  
3 this order to file and serve a first amended petition for writ of habeas corpus. The caption of the  
4 amended petition must include the case number for this action, and must indicate that it is a “first  
5 amended” petition.

6 **IT IS FURTHER ORDERED** that respondents shall, within 45 days after petitioner files and  
7 serves his first amended petition, file and serve a response to the first amended petition.

8 **IT IS FURTHER ORDERED** that, if respondents file an answer, petitioner shall have  
9 45 days from the date on which the answer is served to file and serve a reply.

10 **IT IS FURTHER ORDERED** that, if respondents file a motion to dismiss, petitioner shall  
11 have 45 days to respond to the motion to dismiss, and respondents shall, thereafter, have 30 days to  
12 file a reply in support of the motion.

13 **DATED** this 21st day of May, 2015.

14   
15  
16 Gloria M. Navarro, Chief Judge  
17 United States District Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26